IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4318 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

==========

MEHBOOBKHAN ISMAILKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR DM THAKKAR for Petitioner

MR HL JANI, AGP for Respondent Nos. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/08/2001

ORAL JUDGEMENT

1. Heard Mr.D.M.Thakkar, learned advocate for the petitioner, Mr.H.L.Jani, AGP for the respondent Nos.1, 2 and 3 and Ms.P.J.Davawala, learned Additional Standing Counsel for the respondent No.4.

2. In the present petition under Article 226 of the Constitution of India, the petitioner has challenged the order of detention dated 30/5/2001 passed by the District Magistrate, Panchmahals at Godhra under the provision of Prevention of Black Marketing & Maintenance of Supplies

of Essential Commodities Act, 1980 (hereinafter referred to as the "P.B.M.Act). The order of detention has been passed by the District Magistrate under Section 3(2) of the P.B.M.Act. The ground of detention has been communicated to the petitioner under Section 8(1) of the P.B.M.Act. The present petitioner has been detained at Central Jail, Ahmedabad as Class-II detenu.

3. The detaining authority has filed affidavit-in-reply as well as the State Government has also filed affidavit-in-reply and respondent No.4 - Union of India has also filed affidavit-in-reply which have been taken on record.

4. Mr. D. M. Thakkar, learned advocate for the petitioner has challenged the order of detention on various ground, but according to him one contention is enough to vitiate the order of detention. Mr. Thakkar has submitted that while passing the detention order, the detaining authority has considered the relevant provision of Section 12(AA) of the P.B.M. Act which relates to the jurisdiction to the Special Court. Mr. Thakkar has also submitted that the power and jurisdiction of the Special Court in respect of the P.B.M. Act has not been further extended after the Year-1997 and, therefore, it amounts to consider the relevant provision of Section 12(AA) of the P.B.M.Act which is not existing at all, which is clearly non-application of mind of the detaining authority while passing the order of detention against the present petitioner. The specific contention has been raised by the petitioner in Ground-(j) at page-7 of the petition.

5. Mr.H. L. Jani, learned AGP for the respondent Nos.1, 2 and 3 has submitted that to consider the provision of Section 12(AA) of the P.P.B. Act, which was not in existence, will not adversely affected any legal right of the petitioner and it has not any impact on the detention order, it may be mistake on the part of the detaining authority while passing the detention order considering the provision, it was not in existence but because of considering the nonexisting provision will not vitiate the order of detention. Therefore, according to Mr.Jani, this is not the ground which would vitiate the order of detention because no prejudice is caused to the petitioner. Thus, according to him, since the consideration of the nonexisting provision has not caused any prejudice to the petitioner, the order of detention does not require any interfere by this Court.

6. Ms.P. J. Davawala, learned advocate for the

respondent No.4 has submitted that the order of detention is just and proper, which does not require any interfere by this Court.

7. I have considered the submissions made by the learned advocates for the parties. Looking to the grounds of detention, page 17 (internal page 30, while considering the lesser drastic remedy, the detaining authority has also considered the provisions of section 12AA and was of the view that the action could be taken against the detenu but in view of the serious type of criminal activity of the detenu, the detaining authority was of the view that such type of proceedings would be a time consuming proceedings and if such steps are taken, then, the detenu, by getting released on bail from the court, may continue such type of criminal activity. Therefore, the detaining authority has not thought it expedient to take steps under section 12AA of the Act but to detain the detenu under the PBM Act. It is also clear that the provisions of section 12AA were inserted in the Essential Commodities Act by way of amendment in the year 1982 and has remained in force upto 1997 and, therefore, these provisions have not continued in the Statute and, thus, at the time of passing of the impugned order of detention, such provisions were not in existence. However, same has been considered by the detaining authority. This shows total non-application of mind on the part of the detaining authority and on this ground alone, the impugned order of detention is required to be quashed and set aside.

8. For the aforesaid reasons, the petition succeeds and the same is allowed. The order of detention dated 30/5/2001 is vitiated and resulted to quash and set aside. The detenu Shri Mehboobali Ismailkhan Pathan who has been detained at Central Jail, Ahmedabad be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

[H. K. Rathod,J.]

V.R.Panchal